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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

9 United States of America,)
10 Plaintiff/Respondent,)
11 v.) CR 06-00464 PHX SRB
12 Ira W. Gentry,) CV 12-02210 PHX SRB MEA
13 Defendant/Movant.) REPORT AND RECOMMENDATION
14

15 TO THE HONORABLE SUSAN R. BOLTON:

16 On October 16, 2012, Mr. Ira Gentry ("Movant"), filed
17 a pro se Motion to Vacate, Set Aside, or Correct Sentence
18 pursuant to 28 U.S.C. § 2255. On May 6, 2013, Respondent filed
19 a response to the Motion to Vacate, Set Aside, or Correct
20 Sentence, pursuant to 28 U.S.C. § 2255 ("Response") (Doc. 12).
21 Movant filed a reply to the response to his motion on June 7,
22 2013. See Doc. 14.

23 **I Procedural History**

24 A federal grand jury indictment returned May 3, 2006,
25 charged Movant and a co-defendant with 59 criminal counts,
26 including conspiracy, securities fraud, wire fraud, tax evasion,
27 and money laundering; the indictment also sought forfeiture of
28 real property. Movant was charged with these crimes in

1 connection with a corporate entity, of which he was CEO from the
2 end of 1997 through mid-2001. See Criminal Doc. 1 & Criminal
3 Doc. 3. The government alleged Movant was involved in a "pump
4 and dump" stock manipulation scheme. See Doc. 12 at 1. In a
5 published order entered October 5, 2006, after numerous
6 continuances and a hearing, the Court found the government had
7 sustained its burden of showing Movant was a flight risk and
8 ordered him detained pending trial. See Criminal Doc. 106;
9 United States v. Gentry, 455 F. Supp. 2d 1018 (D. Ariz. 2006).

10 On August 12, 2008, the government moved to dismiss
11 fourteen counts of the indictment, which motion was granted.
12 See Criminal Doc. 432. At the conclusion of a sixteen-day
13 trial, on September 12, 2008, Movant was convicted on 33 felony
14 offenses, comprised of one count of conspiracy, nine counts of
15 securities fraud, five counts of wire fraud, one count of tax
16 evasion, eleven counts of international concealment money
17 laundering, three counts of concealment of money laundering, and
18 three counts of transactional money laundering. See Criminal
19 Doc. 506. Judgments and convictions were entered on March 17,
20 2009, and Movant was sentenced to an aggregate term of 180
21 months imprisonment. See Criminal Doc. 598.

22 The Ninth Circuit Court of Appeals affirmed Movant's
23 convictions and sentences on direct appeal in a published
24 opinion. See United States v. Jenkins, 633 F.3d 788 (9th Cir.),
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1 cert. denied, 132 S. Ct. 453 (2011).¹ In denying relief the
 2 Ninth Circuit Court of Appeals addressed the merits of, *inter*
 3 *alia*, Movant's claim regarding the statute of limitations:

4 The principal legal issue we face is whether
 5 18 U.S.C. § 3292 suspended the running of the
 6 statute of limitations for all counts.
 7 Section 3292 permits the district court to
 8 suspend the statute upon finding that the
 9 government reasonably believes evidence of a
 10 crime under investigation by a grand jury is
 11 in a foreign country and has requested that
 12 evidence. Subject to defined outer limits,
 13 the suspension period lasts until the foreign
 14 government has taken "final action" on the
 15 official request.

16 Appellants argue that an application to
 17 suspend the running of the statute of
 18 limitations must be supported by a sworn
 19 affidavit or other material of evidentiary
 20 value and that § 3292 does not permit the
 21 district court to suspend the statute of
 22 limitations if the government applies after
 23 the statute has expired. The fact that the
 24 government submitted its official request for
 25 evidence to a foreign government before the

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 17 This case arises out of a "pump and dump" scheme
 18 during which Randy Jenkins and Ira Gentry
 19 conspired to secretly acquire millions of shares
 20 of UniDyn Corporation stock, artificially inflate
 21 its value, sell it for significant profit, and
 22 launder the proceeds. After a sixteen-day trial,
 23 a jury convicted Jenkins and Gentry
 24 ("Appellants") of multiple counts of securities
 25 fraud (15 U.S.C. §§ 78ff, 78j(b)); wire fraud (18
 26 U.S.C. § 1343); international concealment money
 27 laundering (18 U.S.C. § 1956(a)(2)(B)(i));
 28 concealment money laundering (18 U.S.C. §
 1956(a)(1)(B)(i)); and transactional money
 laundering (18 U.S.C. § 1957(a)). The jury also
 convicted each appellant of one count of tax
 evasion (26 U.S.C. § 7201) and for conspiracy to
 defraud the United States and commit wire fraud,
 securities fraud, and mail fraud (18 U.S.C. §
 371).

26 United States v. Jenkins, 633 F.3d 788, 793 (9th Cir.), cert. denied
 27 132 S. Ct. 257 & 453 (2011).

1 expiration of the statute is irrelevant, they
2 argue. Consequently, they contend that even
3 though the government submitted a sworn
4 affidavit in support of its § 3292
5 application on June 20, 2005, the district
6 court could not suspend any of the pertinent
7 statutes of limitation that expired before
8 that date. Finally, appellants argue that
9 Canada took "final action" on or before July
10 5, 2005, ending the suspension period and
11 rendering several counts of the indictment
12 untimely. We agree only with appellants'
13 first contention and conclude that the
14 statute of limitations had not expired on any
15 counts before the grand jury returned its
16 indictment.

17 In addition, both appellants contend (1)
18 there was insufficient evidence to support
19 conviction on many counts; (2) the jury's
20 instructions on money laundering were
21 reversible error; and, (3) the district court
22 erred at sentencing in calculating the amount
23 of loss and number of victims. Jenkins also
24 argues that his sentence was substantively
25 unreasonable. Gentry argues that the district
26 court wrongly denied his motion to sever his
27 trial from Jenkins's, and that the district
28 court erred in denying his motion for
additional cross examination of a government
witness. We reject each of these claims and
affirm the convictions and sentences.

Id. at 793-94.

The Supreme Court denied Movant's petition for a writ
of certiorari on October 17, 2011.

On April 22, 2010, while his direct appeal was pending,
Movant sought a new trial pursuant to Federal Rule of Criminal
Procedure 33(a) and (b)(1). Movant challenged his convictions
on counts 35-45, claiming, among other things, that "[n]ewly
obtained evidence from the receiving bank Wells Fargo verifies
that the wires were domestic, originated in New York and were
not international transfers." See Criminal Doc. 748 at 4. On
June 8, 2010, the District Court denied relief, treating the

1 motion as a substantive motion for new trial and finding that
2 "[t]he alleged newly discovered evidence is not newly discovered
3 as it could have been obtained through due diligence..." and
4 that "this 'new' evidence is part of an argument Defendant made
5 at trial which the Court rejected." Criminal Doc. 753.
6 Defendant did not seek appellate review of this ruling.

7 Subsequently, again while his direct appeal was still
8 pending in the Ninth Circuit Court of Appeals, on September 2,
9 2010, Movant moved for a new trial pursuant to Rule 33, Federal
10 Rules of Criminal Procedure. Criminal Doc. 757. Movant again
11 claimed that allegedly newly discovered evidence and Brady
12 violations warranted a new trial. Movant's arguments concerning
13 newly discovered evidence on the issue of international
14 concealment money laundering were the same as those advanced in
15 a prior motion. Compare Criminal Doc. 748, with Criminal Doc.
16 757. Movant also claimed he possessed newly discovered evidence
17 pertinent to the testimony of witnesses and the viability of
18 what he claimed to be his invention, the "Sterling." See
19 Criminal Doc. 757 at 6-7.² On October 6, 2010, the District
20 Court denied the motion for new trial "For the same reasons
21 expressed in this Court's June 8, 2010 Order [Doc 753]."
22 Criminal Doc. 763. Movant did not appeal this order.

23 More than eight months later, on June 30, 2011, Movant
24 filed a pleading captioned as a "Motion for New Trial II."
25 Criminal Doc. 770. In this pleading Movant advanced the same

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27 ² This evidence was allegedly obtained in September 2008,
28 May 2008, and April 2010. See Criminal Doc. 757 at 7-8.

1 claims for relief proffered in his September 2010 motion for a
2 new trial. Movant did not produce evidence significantly or
3 materially different from that presented in the September 2010
4 motion for new trial. On September 19, 2011, the District Court
5 denied the "Motion for New Trial II," once again finding "that
6 there is no newly discovered evidence and that this motion is
7 essentially the same as Defendant Gentry's April 2010 [Doc. 748]
8 and September 2010 [Doc. 757] Motions." Criminal Doc. 779.

9 Movant appealed this decision to the Ninth Circuit
10 Court of Appeals on September 28, 2011. See Criminal Doc. 782.
11 Movant raised eight bases for relief in his appeal from the
12 District Court's denial of his request for a new trial. Movant
13 asserted that:

- 14 (1) alleged newly discovered evidence
15 established that his international money
16 laundering convictions were invalid because
17 no funds crossed international borders;
- 18 (2) alleged newly discovered evidence proved
19 that the Government committed Brady
20 violations regarding wire transfer documents
21 related to the international money laundering
22 convictions;
- 23 (3) a chart utilized at trial by the United
24 States was misleading;
- 25 (4) alleged newly discovered evidence (which
was also allegedly withheld by the United
States in violation of Brady) impeaches the
testimony of Hiroshi Tsuruya;
- (5) alleged newly discovered evidence proves
that three prosecution witnesses gave false
and misleading testimony;
- (6) alleged newly discovered evidence
demonstrates that the Sterling was "not a
fraud"; and
- (7) foreign records were improperly admitted
at trial.

26 Civil Doc. 12 at 4-5, citing Ninth Circuit Court of Appeals
27 Docket No. 11-10495.

1 In a decision entered July 13, 2012, the Ninth Circuit
2 Court of Appeals found each of Movant's arguments "so
3 insubstantial as to not require further argument" and summarily
4 affirmed the District Court's denial of Movant's motion for new
5 trial. Criminal Doc. 791.

6 In his section 2255 motion, Movant contends:

7 1. He was denied his right to due process of law and
8 his right to a fair trial because he was not appointed different
9 counsel.

10 2. All but five counts charged in the 2006 indictment
11 were invalid because the statute of limitations had expired.

12 3. The government withheld material evidence, in
13 violation of Brady v. Maryland.

14 4. He was improperly convicted of international money
15 laundering when no funds crossed international boundaries.

16 5. Five of the government's witnesses committed
17 perjury, altering the outcome of his criminal proceedings.

18 6. He was improperly sentenced because the District
19 Court improperly calculated "loss, victims, and forfeiture," and
20 because the District Court erred by not applying the 2000
21 version of the United States Sentencing Guideline rather than
22 the 2002 version.

23 7. "Foreign evidence admitted at trial through
24 certification did not meet the required indicia of reliability
25 as required pursuant to 18 USC §3505 and Ninth Circuit case
26 law."

1 8. His conviction on Count I must be reversed because
2 the latest act alleged was not one of conspiracy and was outside
3 the statute of limitations.

4 9. The District Court improperly instructed the jury
5 with regard to money laundering.

6 10. The government presented unlawfully obtained
7 evidence at trial; Movant asserts his counsel was ineffective in
8 presenting his Fourth Amendment claim and that he is actually
9 innocent of the charges against him.

10 11. The indictment charged some funds were the result
11 of illegal activity and subject to forfeiture. Accordingly,
12 Movant contends, the government is estopped from asserting
13 Movant should have declared this income as capital gains or
14 lawful income.

15 12. "Counts 39, 40, 44, and 45 are essential payments
16 and as such are not money laundering."

17 13. Counts 2 through 11 and 12 through 17 should have
18 been dismissed on the same basis as 18 through 22 because "they
19 rely upon a conviction for the trading of stock."

20 14. His counsel's representation was so ineffective at
21 every step of his criminal proceedings that he was essentially
22 not represented by counsel.

23 15. Venue in the District of Arizona was improper with
24 regard to Counts 39 and 40.

25 Respondent allows that the motion is timely.

II Analysis

A. Defaulted claims

Because “[h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal,” Bousley v. United States, 523 U.S. 614, 621, 118 S. Ct. 1604, 1610 (1998), absent a showing of cause and prejudice a section 2255 movant procedurally defaults all claims which were not raised in his direct appeal, other than claims asserting that the movant was deprived of the right to the effective assistance of counsel. See United States v. Frady, 456 U.S. 152, 167-68, 102 S. Ct. 1584, 1594 (1982); United States v. Ratigan, 351 F.3d 957, 964 (9th Cir. 2003); United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993).

“[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) ‘cause’ excusing his double procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.” Frady, 456 U.S. at 167-68, 102 S. Ct. at 1594. See also Ratigan, 351 F.3d at 964. A section 2255 movant who fails to show cause and prejudice can still obtain review of a claim on collateral attack by demonstrating the likelihood of his “actual,” i.e., factual, innocence. See Bousley, 523 U.S. at 623, 118 S. Ct. at 1611-12; United States v. Braswell, 501 F.3d 1147, 1150 (9th Cir. 2007). To establish actual innocence the movant must demonstrate that, in light of all the evidence, including new evidence that might be introduced by both sides, it is more likely than not that no

1 reasonable juror would have convicted him. See Ratigan, 351
2 F.3d at 964, quoting Bousley, 523 U.S. at 623, 118 S. Ct. at
3 1611.

4 Movant has not shown cause nor prejudice with regard to
5 any defaulted claim. Although Movant asserts his actual
6 innocence, he has not established any likelihood of his factual
7 innocence. Accordingly, any claim other than an ineffective
8 assistance of counsel claim which Movant did not assert in his
9 direct appeal has been procedurally defaulted and should not be
10 considered by the Court.

11 Additionally, as a general rule, "[i]ssues disposed of
12 on a previous direct appeal are not reviewable in a subsequent
13 § 2255 proceeding." United States v. Currie, 589 F.2d 993, 995
14 (9th Cir. 1979). A section 2255 petitioner may, in limited
15 circumstances, raise claims of *trial court error* that were
16 previously raised and decided on direct appeal. See Feldman v.
17 Henman, 815 F.2d 1318, 1322 (9th Cir. 1987) (emphasis added),
18 citing Kaufman v. United States, 394 U.S. 217, 227 n.8, 89 S.
19 Ct. 1068, 1074 n.8 (1969).

20 The scope of this exception has been
21 clarified by Supreme Court and Ninth Circuit
22 case law. The guiding principles may be
23 summarized as follows: When a district court
24 is confronted by a repetitive claim in a §
25 2255 Motion, the court may refuse to consider
26 the claim and may give controlling weight to
27 the court of appeals' determination if (1)
28 the "same ground" presented in the § 2255
Motion was previously determined adversely to
the petitioner; (2) the prior determination
was "on the merits;" and (3) the "ends of
justice" would not be served by reaching the
merits of the claim in the subsequent § 2255
Motion. Sanders v. United States, 373 U.S. 1,

1 15, 83 S.Ct. 1068, 1077, [] (1963); Molina v.
2 Rison, 886 F.2d 1124, 1127 (9th Cir. 1989);
3 Polizzi v. United States, 550 F.2d 1133, 1135
(9th Cir. 1976).

4 United States v. Olmos-Esparza, 974 F. Supp. 1311, 1317 (S.D.
5 Cal. 1997).

6 Movant's claims regarding the statute of limitations,
7 insufficient evidence to support his convictions, allegedly
8 impropriety in the jury instruction on money laundering, Brady
9 violations, the alleged perjury of government witnesses, the
10 improper admission of evidence, and error at sentencing in
11 calculating the amount of loss and number of victims, were all
12 brought before the Ninth Circuit Court of Appeals and rejected
13 by the appellate court on the merits of those claims.
14 Additionally, the prior determinations were on the merits of the
15 claims and the ends of justice would not be served by analyzing
16 the claims. Therefore, the Court should not re-visit these
17 claims.

18 Movant has not established cause for nor prejudice
19 arising from his procedural default of any habeas claims other
20 than ineffective assistance of counsel. Although Movant asserts
21 his actual innocence of the crimes of conviction, Movant is
22 actually asserting that his actions do not constitute crimes for
23 which he may be punished. Movant has not established a basis
24 for the Court to reconsider claims previously denied on the
25 merits by the Ninth Circuit Court of Appeals. Accordingly, the
26 Court should not consider the merits of any claims other than
27 Movant's ineffective assistance of counsel claims.

B. Movant's ineffective assistance of counsel claims

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).... To prevail on a claim of ineffective assistance of counsel, petitioner must show 1) his attorney's performance was unreasonable under prevailing professional standards; and 2) there is a reasonable probability that but for counsel's unprofessional errors, the results would have been different. United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "Strickland defines a reasonable probability as 'a probability sufficient to undermine confidence in the outcome.'" Id.

United States v. Span, 75 F.3d 1383, 1386-87 (9th Cir. 1996). See also United States v. Thomas, 417 F. 3d 1053, 1056 (9th Cir. 2005).

Counsel's performance is deficient when it is unreasonable, or not "within the range of competence demanded of attorneys in criminal cases." Strickland, 466 U.S. at 687, 104 S. Ct. at 2054. Judicial scrutiny of counsel's performance must be "highly deferential." Id., 466 U.S. at 689, 104 S. Ct. at 2065. There is a "strong presumption" that trial counsel's conduct and strategy falls "within the wide range of reasonable professional assistance." Id. To establish that his counsel's conduct was unconstitutionally substandard, a section 2255 petitioner must establish that no competent counsel would have acted as his counsel acted, i.e., that his counsel's acts were unreasonable. United States v. Fredman, 390 F.3d 1153, 1156 (9th Cir. 2004); United States v. Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1996) ("[r]eview of counsel's performance

1 is highly deferential and there is a strong presumption that
2 counsel's conduct fell within the wide range of reasonable
3 representation."); Johnson v. Alabama, 256 F.3d 1156, 1176-77
4 (11th Cir. 2001).

5 It is Movant's burden to provide the Court with
6 sufficient evidence from which the Court can conclude his
7 counsel's performance was unconstitutionally ineffective. See
8 United States v. Withers, 638 F.3d 1055, 1066-67 (9th Cir.
9 2011). With regard to the prejudice prong of the Strickland
10 analysis, the probability of prejudice may not be based merely
11 upon conjecture or speculation. See Mickens v. Taylor, 122 S.
12 Ct. 1237, 1246 (2002) (Kennedy, J. concurrence) (regarding
13 speculation as having no place in a Strickland analysis); Horton
14 v. Mayle, 408 F.3d 570, 577 (9th Cir. 2005).

15 Movant asserts, *inter alia*, that he "was denied due
16 process" and "forced into an unfair trial" because "[the Court]
17 made no inquiry into the serious conflicts that arose between
18 Gentry and Court appointed counsel." The record reveals
19 Movant's counsel's representation of Movant was not below an
20 objective standard of reasonableness. Counsel challenged the
21 evidence and the government's case against Movant.

22 Movant's claims regarding the alleged deficient
23 performance of his counsel are premised primarily on Movant's
24 contention that counsel should have pressed particular issues
25 which counsel did not raise, such as Movant's contention
26 regarding venue. Many of these issues were raised by Movant in
27 his direct appeal or his other post-conviction proceedings and
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1 relief was denied. Accordingly, with regard to these assertions
2 of error, Movant has not established that his counsel's
3 performance was unreasonably unprofessional, or that Movant was
4 prejudiced by any alleged failure of counsel to press these
5 issues. United States v. Molina, 934 F.2d 1440, 1447 (9th Cir.
6 1991) ("it is not professionally unreasonable to decide not to
7 file a motion so clearly lacking in merit.").

8 **III Conclusion**

9 Movant is not entitled to relief on the merits of his
10 ineffective assistance of counsel claims. Movant has not
11 established that his counsel's performance was deficient or that
12 he was prejudiced by any alleged deficiency in performance.

13 Most of Movant's section 2255 claims were denied on the
14 merits by the Ninth Circuit Court of Appeals. Accordingly, the
15 Court should not re-consider the merits of the claim. Movant's
16 other claims were procedurally defaulted by his failure to raise
17 them in his direct appeal. Movant has not show cause for, nor
18 prejudice arising from his procedural default of section 2255
19 claims, nor his actual innocence.

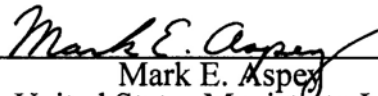
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21 **IT IS THEREFORE RECOMMENDED** that Mr. Gentry's motion
22 for relief from his convictions and sentences pursuant to
23 section 2255 be **denied and dismissed with prejudice**.

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25 This recommendation is not an order that is immediately
26 appealable to the Ninth Circuit Court of Appeals. Any notice of
27 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
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1 Procedure, should not be filed until entry of the District
2 Court's judgment.

3 Pursuant to Rule 72(b), Federal Rules of Civil
4 Procedure, the parties shall have fourteen (14) days from the
5 date of service of a copy of this recommendation within which to
6 file specific written objections with the Court. Thereafter,
7 the parties have fourteen (14) days within which to file a
8 response to the objections.

9 DATED this 2nd day of July, 2013.

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12 _____
13 Mark E. Asper
14 United States Magistrate Judge
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